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IN THE
SUPREME COURT OF THE UNITED STATES

JAMES A. GAMMON,
Superintendent,
Moberly Correctional Center, and
JEREMIAH W. (JAY) NIXON,
Attorney General of Missouri,

*Petitioners*,

vs.

JON KEITH SMITH,

*Respondent.*

On Petition for Writ of Certiorari To The United States Court of Appeals For the Eighth Circuit

# *REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI*

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**IN THE SUPREME COURT OF MISSOURI**

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# *REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI*

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Despite Respondent's claims to the contrary the decision of the Court below directly conflicts with the fifth Circuit precedents in ***Jacobs v. Scott***, 31 F.3d 1319 (5th Cir. 1994) and ***Nichols v. Scott***, 69 F.3d 1255 (5th Cir. (1995). Also contrary to Respondent's claims the decision of the court below is contrary to and in conflict with this Court's ***Teague v. Lane*** jurisprudence.

## The Attempt to Distinguish *Jacobs v. Scott*

Respondent argues that there is no conflict with ***Jacobs v. Scott***, because the claim in ***Jacobs*** that the prosecutor used contradictory theories in the trial of accomplices and therefore violated due process was decided on procedural bar grounds, as opposed to ***Teague*** (Brief in Opposition at 10-11). This is simply wrong. The Fifth Circuit explicitly relied on ***Teague v. Lane*** as the reason for rejecting this claim. ***Jacobs v. Scott***, 31 F.3d at 1326.

Respondent apparently concludes that the claim was decided based on procedural bar because the opinion discussed newly discovered evidence at page 1325 (Brief in Opposition at 11). But, a careful reading of ***Jacobs*** reveals that this discussion was in the context of a separate free standing claim of actual innocence of the crime and innocence of the death penalty. ***Jacobs v. Scott***, 31 F.3d at 1324-1325. The due process contradictory evidence claim was decided on the threshold issue of ***Teague v. Lane***, 489 U.S. 288 (1989), and the decision is in direct conflict with the decision of the court below in this case.

Respondent also argues that ***Jacobs*** is factually distinguishable because the theories presented in the trials of Jacobs and his accomplice were not "directly contradictory and diametrically opposed" and did not go to the "core of the prosecutor's case" (Brief in Opposition at 11). Again, Respondent is wrong. Jacobs was convicted and sentenced to death based on the theory that he was the triggerman, but at the trial of Hogan, the state argued that Jacobs not only did not know Hogan, had a gun but that Jacobs did not in any way anticipate the victim would be shot. ***Jacobs v. Scott***, 31 F.3d at 1322-1323. Jacobs would necessarily be innocent of capital murder, the crime of which he was convicted under the theory presented at the trial of Hogan. *Id.* at 1324.

## The Attempt to Distinguish *Nichols v. Scott*

Respondent asserts that ***Nichols v. Scott***, 69 F.3d 1255 (5th Cir. 1995) is distinguishable from the decision of the court below because ***Nichols*** "was not a due process decision but rested on principles of estoppel, both collateral and judicial" (Brief in Opposition at 11-12) (emphasis added). Respondent is wrong. The section discussing the contradictory prosecutorial theories claim in ***Nichols v. Scott***, is titled "Estoppel-Due Process." *Id.* at 1268. The Fifth Circuit pointed out that in granting relief the district court found the following, "the due process boundary upon prosecutorial conduct and the appearance of basic fairness derived from that boundary command[s] a determination that in a criminal prosecution, the state is *constitutionally estopped* from obtaining a fact finding in one trial and seeking and obtaining an inconsistent fact finding in another trial." *Id.* The Fifth Circuit however rejected the proposition that "generic due process" could support such a decision absent a double jeopardy violation which is the constitutional basis of collateral estoppel. *Id.* at 1269. The Fifth Circuit also rejected the district court's conclusion that due process was violated based on constitutionally mandated judicial estoppel, pointing out that judicial estoppel is not constitutionally mandated and that the doctrine has apparently never been applied against the government in a criminal case. *Id.* at 1272.

Read in context, the Fifth Circuit's application of the principles of ***Teague v. Lane*** to deny relief in ***Nichols*** is clearly an application of ***Teague*** to the due process clause. The Fifth Circuit in fact explicitly rejected the argument that a ***Teague*** bar could be avoided by relying on judicial pronouncements that due process concerns itself with fundamental fairness. *Id.* at 1274. The court below in direct conflict with ***Nichols*** essentially relied on broad judicial

pronouncements about fairness in finding the rule of law it applied was not new (App. at 16).

Of course ***Nichols v. Scott*** was a due process case. If the due process clause was not at the root of the decision, the federal courts would have had no jurisdiction to review the case under 28 U.S.C. §2254(a). ***Nichols v. Scott*** directly conflicts the decision of the court below.

Respondent also argues that ***Nichols v. Scott*** is distinguishable from the opinion of the court below because "the inconsistent theories presented in *Nichols* case were not factually inconsistent and had no effect on the liability of either accomplice" (Brief in Opposition at 12). The theories presented by the prosecutor at the trials of the accomplices in the ***Nichols*** case were factually inconsistent as the following excerpt from closing arguments quoted in the district court opinion demonstrates.

**Williams Trial**

> "Willie Williams is the individual who shot and killed Claude Shaffer. That is all there is to it. It is scientific. It is consistent. It is complete. It is final, and it is in evidence."
>
> "[T]here is only one bullet that could possibly have done it and that was Willie Williams."

**Nichols Trial**

> "Willie could not have shot him."
>
> "And I submit to you from the evidence, [Nichols] fired the fatal bullet and killed the man in cold blood and he should

answer for that."

At the punishment phase:

> "Is it fair and equal for Willie Williams to sit up there on death row when this man planned the whole ting and fired the shot."

***Nichols v. Collins***, 802 F.Supp. 66, 73 (S.D. Tex 1992).

In short, the prosecutor argued at Williams' penalty phase that Williams fired the fatal shot and only Williams possibly could have fired it. He then argued at Nichols' trial that Nichols fired the fatal shot and that Williams could not have done it. Then, he argued Nichols should be sentenced to death based on fairness and equality because Williams had been sentenced to death but Nichols fired the fatal shot.

The court below rejected the affirmative defense of ***Teague*** bar based on the general principle that the due process clause dictates that prosecutors must be fair and presenting contradictory theories at the trials of accomplices is unfair (App. at 16). The prosecutor's conduct in ***Nichols*** cannot be objectively viewed as more fair to Nichols than the prosecutor's conduct was to Respondent. In fact that conduct must objectively be viewed as less fair, and yet the ***Teague v. Lane*** bars was properly upheld in ***Nichols***. ***Nichols v. Scott*** is in conflict with the decision of the court below.

## The Misinterpretation of this Court's *Teague v. Lane* Jurisprudence

Despite Respondent's argument to the contrary the opinion of the court below explicitly misinterprets and misapplies this Court's ***Teague v. Lane*** jurisprudence. In

***Saffle v. Parks***, 494 U.S. 484, 486 (1990), this Court stated the following in finding a rule of law to be new. "It is not dictated by our prior cases and were it to be adopted it would contravene well considered precedents."[1] The court below cited this statement for the proposition that, "[u]nder ***Teague***, a new rule is one that is not dictated by precedent and if adopted would contravene well established precedents" (App. at 16).

What the court below has explicitly done is create a two part conjunctive test to determine if a rule of law is new. Under this test a rule is new only if it is not dictated by existing precedents and if it would contravene well established precedents. The second prong of this test has no foundation in the jurisprudence of this Court including the ***Saffle*** decision. ***See Saffle v. Parks***, 494 U.S. at 488 (stating, "In ***Teague***, we defined a new rule as a rule that breaks new ground imposes a new obligation on the states or federal government or was not dictated by precedent existing at the time the defendant's conviction became final"). The definition of a new rule adopted by the court below excludes from the definition of new rules, rules which are not dictated by existing precedent, but which do not contravene well established precedent. This conjunctive definition turns this Court's ***Teague*** jurisprudence on its head. This definition which significantly narrows the definition of a "new rule" necessarily creates the potential for future conflicts between the court below and other circuit courts of appeals.

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[1]Petitioners mistakenly indicated in the petition that this statement is in the syllabus of ***Saffle***. It is actually on the first full page of the opinion.

## CONCLUSION

**WHEREFORE**, Petitioners pray that this Court grant the pending petition for the writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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